Supreme Court, U.S.
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No. 98-601

In The

Supreme Court of the United States

October Term, 1998

HONORABLE BRUCE W. DODDS,

Petitioner,

vs.

AMERICAN BROADCASTING COMPANY, INC.,
a Delaware Corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondent American Broadcasting Companies, Inc. hereby submits this statement identifying its parent companies and nonwholly owned subsidiaries. American Broadcasting Companies, Inc. has no nonwholly owned subsidiaries. The parent company of American Broadcasting Companies, Inc., is ABC, Inc. (formerly known as Capital Cities/ABC, Inc.). On February 9, 1996, The Walt Disney Company completed its acquisition of Capital Cities/ABC, Inc., which is now a wholly owned subsidiary of The Walt Disney Company. Therefore, American Broadcasting Companies, Inc. is an indirect subsidiary of The Walt Disney Company, which is the entity whose shares are currently traded.

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INTRODUCTION

Respondent American Broadcasting Companies, Inc. ("ABC") respectfully submits this brief in opposition to petitioner Bruce W. Dodds' petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. For the reasons set out below, the petition presents no issue appropriate for review by this Court and should be denied.

STATEMENT OF THE CASE

The petitioner in this action is Bruce W. Dodds, who was, at the time of the ABC broadcast at issue, an elected member of the Superior Court of the County of Santa Barbara, California. On October 6, 1994, ABC broadcast a report during its news magazine show "PrimeTime Live" that focused on the systems in place to address allegations of misconduct and inappropriate behavior on the part of state court judges. The purpose of the report, according to one of its producers, "was to look at what kind of disciplinary action there is against judges, and when certain allegations come up, allegations of misconduct, how the system handles those allegations." In addition to a general discussion of judicial disciplinary proceedings, the report focused on allegations that had been made regarding three specific judges, including Judge Dodds.[1]

ABC reporter Cynthia McFadden introduced the segment about Judge Dodds by noting that in the past several years, "a stream of complaints has been aimed at Judge Dodds over his

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1. At the time of the broadcast, Judge Dodds was under investigation by the California Commission on Judicial Performance because of allegations that he had interfered with a law enforcement investigation and had displayed rudeness and prejudgment in handling cases. *See Dodds v. Commission on Judicial Performance*, 12 Cal. 4th 163, 168, 906 P.2d 1260 (1995).

judicial temperament, or lack of it." After airing Judge Dodds' statement that he had done nothing wrong, the report stated that a former court clerk for Judge Dodds had said in a sworn declaration that Dodds had screamed and spit in court and had read newspapers and magazines while on the bench.

The report then focused on another litigant, Ms. Christine Johnson, who had appeared before Judge Dodds in 1992. Ms. Johnson and her son had been suing the Catholic Church because, she alleged, a priest had molested her son. Ms. Johnson said that during a settlement conference in the case, Judge Dodds had told her, in her son's presence, that the molestation had "only happened twice" and was "no big deal."

ABC reporter McFadden noted that "Johnson says" that Judge Dodds had pressured her to accept a low settlement. Ms. Johnson then described how Judge Dodds had referred to a crystal ball to confirm the propriety of the settlement amount:

> Christine Johnson: He had a crystal ball on the settlement conference table where he asked us to sit.
>
> Cynthia McFadden: Did he use this crystal ball?
>
> Christine Johnson: Yes, he did. He said, "This is what I think your case is worth," and then pressed a button on the crystal ball and it answered "Yes." And he said, "There it is. That's it. That's what you get."

ABC reporter McFadden then noted that "[l]awyers, litigants and [Dodds'] former clerk all say Dodds often used the crystal ball to support his decisions."[2]

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2. In the introduction to the broadcast, a different litigant was also heard saying that an unidentified judge "uses a crystal ball often, even in adoption cases."

The report then showed Ms. McFadden's unsuccessful attempt to interview Judge Dodds, and it quoted his reason for refusing to be interviewed:

> We asked for an interview with the judge, but he refused, saying state law prevented him from talking about the case.

The report's segment regarding Judge Dodds ended by pointing out that an ABC reporter had seen a crystal ball sitting on a table in Judge Dodds' chambers.

At the conclusion of the entire report, ABC News anchorwoman Diane Sawyer repeated that Judge Dodds had "denie[d] the allegations against him"; she further stated that the California Commission on Judicial Performance would not confirm or deny that it was investigating allegations involving Dodds.

The Commission on Judicial Performance issued Findings of Fact and Conclusions of Law regarding Judge Dodds in February 1995, four months after the broadcast. Although the Commission did not mention Judge Dodds' crystal ball in its Findings and Conclusions, it did find that Dodds had committed misconduct by interfering with a law enforcement investigation involving a different judge and by frequently exhibiting rudeness and prejudgment in his cases. *See Dodds*, 12 Cal. 4th at 167-68. The Commission recommended that Dodds be publicly censured. *Id.* Judge Dodds appealed the Commission's findings and conclusions to the California Supreme Court. *Id.* That Court subsequently issued an opinion that rejected the Commission's recommendation that Judge Dodds be publicly censured for his misconduct. The Court concluded, however, that "clear and convincing evidence supports the Commission's findings of fact." *Id.* at 168-70. In particular, the California

Supreme Court held that Judge Dodds had brought disrepute upon the judicial office by acting improperly during settlement conferences:

> [Dodds] argues that his "assertive" judicial "style" is desirable because it enables him to effect settlements in difficult cases. [Dodds'] argument betrays an understanding of the judicial role that places too much emphasis on the efficient disposition of cases and too little emphasis on the dignity of litigants. . . . Even an otherwise just settlement, if imposed summarily and coercively, is likely to disserve justice by leaving the parties with a lingering resentment of one another and the judicial system. We laud the creative and diverse means by which judges assist parties in reaching voluntary settlements of complex disputes. But when a judge, clothed with the prestige and authority of his judicial office, repeatedly interrupts a litigant and yells angrily and without adequate provocation, the judge exceeds his proper role and casts disrepute on the judicial office.

Dodds, 12 Cal. 4th at 176-77.

In October 1995, Dodds filed suit against ABC in federal court in Los Angeles. Dodds' complaint asserted claims under California law for defamation and intentional infliction of emotional distress. Dodds claimed that he had been defamed by various explicit statements contained in the broadcast as well as by several negative implications that, he claimed, arose from the broadcast. Federal jurisdiction was premised upon the diversity of the parties.

In June 1996, ABC moved for summary judgment on each of Dodds' claims. After continuing the hearing on ABC's motion and permitting additional discovery and briefing, the district court granted the motion on July 30, 1996. Pet. App. 34a-50a.

The only allegedly defamatory statements or implications that were at issue at the time the district court entered summary judgment related to Judge Dodds' use of a crystal ball. As the district court explained,

> [t]he crystal ball issue relates to the allegations that [ABC] slandered [Judge Dodds] by *stating* that he uses a crystal ball to *support* his decisions and by *implying* that he only *makes* decisions based on a crystal ball.

Pet. App. 35a (emphasis in original).

After reviewing the evidence submitted by the parties, the district court first held that Judge Dodds had not met his burden of establishing that ABC had acted with actual malice in broadcasting the statement that Dodds used his crystal ball to *support* his decisions. Pet. App. 38a. The district court began its actual malice analysis by placing the burden upon Judge Dodds to show that ABC either "realized that [its] statement was false or that [it] subjectively entertained serious doubt as to the truth of [its] statement." *Id.* at 37a, *quoting Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 511 n.30 (1984). The district court also explained that the "actual malice" requirement is a *subjective* one, and that only the existence of "sufficient evidence to permit the conclusion that the defendant actually had a high degree of awareness of . . . probable falsity" would suffice to meet the plaintiff's burden. *Id.*, *quoting Harte-*

Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 660 (1989).[3]

Applying this test to the record before it, the district court then noted that:

> (1) each of the individuals involved in the ABC broadcast had testified that he or she did not doubt the truth of the broadcast's crystal ball-related statements;
>
> (2) ABC had not relied on its initial sources "blindly and exclusively," but had talked to Dodds' former court clerk, an adoption case worker and several lawyers about Dodds' use of his crystal ball. These individuals had confirmed that Dodds used a crystal ball to support his decisions or to "demonstrate that he was right;" and
>
> (3) ABC had confirmed firsthand that plaintiff had a crystal ball on a desk in his office.

Id. at 37a, 40a.

The district court concluded that

> this is not a case where it would be appropriate to say that the sources relied upon were so untrustworthy, what they said was so improbable, and the investigation was so negligible, that ABC

3. As discussed more fully in Section III below, both of these conclusions regarding Dodds' burden of proof were consistent with a prior filing by Dodds in the district court where Dodds had stated that he did not dispute ABC's position regarding the applicable legal standard on the issue of "actual malice."

> can be said, without any evidence, to have subjectively entertained serious doubts as to the truth of its statements.

Pet. App. 41a. *See also id.* (finding "nothing whatever in the record indicating that ABC ever took any action intentionally designed to avoid discovering the truth").[4]

The district court also rejected Judge Dodds' defamation claim based upon the purportedly *implied* statement by ABC that Dodds "only *makes* decisions based on a crystal ball." Pet. App. 35a (emphasis in original). The district court noted that Dodds had agreed that it was his burden to establish "by clear and convincing evidence that ABC in fact 'intended that the [broadcast] be read to contain the defamatory innuendos the plaintiff attributes to it.' " *Id.* at 41a, *quoting Woods v. Evansville Press Co.*, 791 F.2d 480, 486-87 (7th Cir. 1986). As the district court put it, in order

> to withstand summary judgment, [Dodds] would . . . have to present evidence from which a jury could find both that ABC knew the inference to be false (or seriously doubted its truth) *and* that it intended the inference to arise.

Id. at 41a-42a (emphasis in original).

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4. Petitioner tells this Court that ABC's actual malice should have been inferred from the fact that, over one year after the broadcast, an ABC producer discarded his notes and files relating to the broadcast. Pet. 4-6. As the district court noted, however, it was undisputed that the producer had thrown away *all* of his ABC-related materials, not just his materials regarding this particular story, after he had left ABC and while he was remodeling his home office, and that the producer did not know of Dodds' suit at the time. Pet. App. 46a.

The district court held that Dodds had not met this burden. The court pointed out that: (1) the ABC witnesses had testified that they did not intend that the broadcast imply that Dodds used his crystal ball to *make* decisions; (2) Dodds had no contrary evidence; and (3) Dodds' argument that the alleged implication was self-evident from the broadcast was no substitute for the evidence of *subjective* intent required by the actual malice standard. Pet. App. 42a-43a, *citing Newton v. National Broadcasting Co., Inc.*, 930 F.2d 662, 668 (9th Cir. 1990).

On appeal, the Court of Appeals for the Ninth Circuit affirmed the district court's entry of summary judgment (and its earlier ruling dismissing certain of Dodds' claims at the Rule 12(b)(6) stage). Pet. App. 1a-33a. With respect to the question whether petitioner had presented sufficient evidence that ABC had broadcast with actual malice the *explicit* statement that Dodds had often used his crystal ball to *support* his decisions, the court of appeals cited many of the same factors upon which the district court had relied:

> [W]e note that numerous sources informed ABC that they were personally aware of Judge Dodds's use of the crystal ball in the manner suggested by the litigants who actually appeared in the broadcast. These additional sources included other litigants, a former clerk, and attorneys who had dealings with Judge Dodds. In addition, although its methods of obtaining the information left something to be desired, ABC confirmed that a crystal ball sat on Judge Dodds's table in chambers. . . .

Id. at 16a. The court of appeals further noted Dodds' admission in his deposition "that he had in fact used the crystal ball during the settlement negotiations involving Johnson." *Id.* at 16a, n.4.[5]

5. Christine Johnson was the woman who had described Dodds' use of the crystal ball during a settlement conference.

The court of appeals also affirmed the district court's entry of summary judgment on that portion of Dodds' defamation claim that was based upon ABC's *implied* statement that he used the crystal ball to *make*, not just to *support*, his decisions. The court addressed this claim in two analytically distinct steps. First, the court asked whether a reasonable jury "could find that ABC was stating by implication that Judge Dodds in fact decided issues by consulting the crystal ball." Pet. App. 22a. Second, the court asked whether a jury "could reasonably find by clear and convincing evidence that ABC 'intended to convey the defamatory impression.' " *Id.* at 21a, *quoting Newton*, 930 F.2d at 681.

As for the first step, the court of appeals agreed with Dodds that a jury could reasonably find that the broadcast had implied that he had used his crystal ball to make judicial decisions. Pet. App. 22a. With respect to the second step, the court held — essentially for the reasons cited by the district court — that Dodds had not come forward with sufficient evidence that ABC had subjectively intended to convey that defamatory impression. *Id.* The court also rejected Dodds' suggestion that it utilize "an objective, 'reasonable viewer' standard" in order to decide Dodds' libel-by-implication claim. *Id.* at 23a. The court, applying the principles of *New York Times* and the test established in the Ninth Circuit's prior decision in *Newton*, "reaffirmed" that a plaintiff alleging a defamatory implication must show not only that the statement in question could give rise to the defamatory implication, but also that the defendant "actually intended to convey the defamatory impression." *Id.* As the court of appeals explained:

> the *Newton* test requiring a clear and convincing showing of subjective or actual intent strikes the proper balance between protecting victims of defamation and protecting against the possible

> chilling effect that results from overly broad applications of our defamation laws.

Id. at 23a-24a, citing *Newton*, 930 F.2d at 681. In so holding, the court of appeals observed that "all of the courts of appeal that have considered cases involving defamation by implication have imposed a similar actual intent requirement." *Id.*, citing *Chapin v. Knight-Ridder*, 993 F.2d 1087, 1093 (4th Cir. 1993), and *White v. Fraternal Order of Police*, 909 F.2d 512, 520 (D.C. Cir. 1990).

This last issue is the *only* issue as to which petitioner seeks review by this Court. Petitioner does not challenge the dismissal of *any* claim based upon statements *actually contained* in the ABC broadcast. Instead, he asks this Court to hold that a public official may prevail on a claim that he has been libeled by an *inference* contained in a news report as long as the inference is one that a reasonable viewer could draw, regardless of whether the statements *actually* made in the report are protected from liability by the First Amendment, and regardless of whether the publisher *subjectively* intended to convey the allegedly defamatory inference.

For the reasons set out below, this Court should deny the petition. First, the court of appeals applied well-settled law established in *New York Times v. Sullivan*, 376 U.S. 254 (1964), and its progeny. This Court has made clear that a public official cannot recover for a defamatory falsehood unless he or she proves with "convincing clarity" that the false statement was made with "actual malice." *See id.* at 285-86. The court of appeals simply applied this well-established test to the facts alleged in this case, agreeing with other circuit courts that the "actual malice" test applies equally when the alleged defamation is through an *implication* rather than a direct statement. The objective, "implied malice" approach suggested

by petitioner is illogical, has not been adopted by any court of appeals, and would eviscerate the broad protections for reporting on the conduct of public officials that were established in *New York Times* and the cases following it.

Second, there is no conflict among the circuit courts on the issue presented here. The cases that petitioner cites to support a claimed conflict either were decided wholly as a matter of state law, or are entirely consistent with the Ninth Circuit's decision here.

Finally, petitioner expressly stipulated in the district court — as the district court noted in its opinion granting summary judgment — that it was his burden to prove by clear and convincing evidence that ABC in fact intended to convey the defamatory implication in question. Pet. App. 41a. Petitioner has thereby waived the issue raised in his petition. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976).

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS' DECISION APPLIES THIS COURT'S WELL-SETTLED PRECEDENT, UNDER WHICH A PUBLIC OFFICIAL ASSERTING A LIBEL CLAIM MUST SHOW BY CLEAR AND CONVINCING EVIDENCE THAT THE DEFENDANT SUBJECTIVELY INTENDED TO UTTER A DEFAMATORY FALSEHOOD.

The court of appeals in this case did nothing more than apply this Court's well-settled precedent applicable to public officials who assert defamation claims arising from criticisms about their official conduct. Such a claim, this Court has made clear, must be

> considered against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open and that it may include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

New York Times, 376 U.S. at 267-70. In light of this Constitutional commitment, this Court has held that where a journalist's report regarding a matter of public concern

> reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth.

Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990).

There is a "paramount public interest in a free flow of information to the people concerning public officials." *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964). Although constitutional principles do not give to any journalist the right knowingly to publish false statements of fact about a judge or any other public official, the dangers that arise when a public official sues the press for publishing criticisms *of his official conduct* cannot be lightly dismissed. As this Court has observed:

> [T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.

Mills v. State of Alabama, 384 U.S. 214, 218 (1966).

These principles are not muted when the plaintiff is an elected trial court judge. To the contrary, as this Court has repeatedly held, "[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978). *See also Bridges v. State of California*, 314 U.S. 252, 270-271 (1941) ("The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion . . . [A]n enforced silence . . . in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect."); *id.* at 289 (Frankfurter, J., dissenting in part) ("Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions.").

In *New York Times*, this Court held that a public official cannot recover damages for a defamatory falsehood unless he or she proves, with "convincing clarity," that the false statement was made knowingly and with "actual malice." 376 U.S. at 285-86. The actual malice test is a subjective one, and can be met only by evidence that the defendant "realized that his statement was false or that he subjectively entertained serious doubts as to the truth of his statement." *Bose Corp.*, 466 U.S. at 511 n.30.

Since *New York Times*, this Court has confirmed repeatedly that a public official must show actual malice *whenever* he or she asserts a claim, however denominated, that arises from "speech injurious to reputation. . . ." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511 (1991). *See generally Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (where a claim by a public figure for intentional infliction of emotional distress is based upon a claimed defamatory publication, the plaintiff must show both that the statement was false and that it was

made with actual malice, "*i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true"). In *Milkovich*, after reviewing the "constitutional evolution" of defamation cases since *New York Times*, this Court observed that:

> The *New York Times — Butts — Gertz* culpability requirements further ensure that debate on public issues remains "uninhibited, robust, and wide-open." *Thus, where a statement of 'opinion' on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth.*

497 U.S. at 20 (citation omitted) (emphasis supplied).

Despite this settled jurisprudence, petitioner asks this Court to hold that a defendant may be held liable for the defamatory implications of his or her speech based on an *objective* showing — that the publisher should have known the defamatory inference could arise — rather than a *subjective* showing — that the publisher in fact intended the assertedly false inference to arise.

The test proposed by petitioner has not been adopted by any circuit court. The two circuit courts to consider it, the Seventh and Ninth Circuits, have expressly rejected it. In *Woods v. Evansville Press Co., Inc.*, 791 F.2d 480 (7th Cir. 1986), for example, the plaintiff claimed that a newspaper column falsely implied that he was in financial trouble and was a religious fraud. The plaintiff contended that he should be allowed to recover regardless of whether the defendant had actually intended that the news article contain these implications. *Id.* at 487. The Seventh Circuit rejected plaintiff's proposed approach:

> In *New York Times*, . . . the Supreme Court recognized that a rule requiring a publisher to guarantee the truth of his statements would result in "self-censorship", which would have a chilling effect on public debate and the free exchange of ideas. Similarly, requiring a publisher to guarantee the truth of all the inferences a reader might reasonably draw from a publication would undermine the uninhibited, open discussion of matters of public concern. A publisher reporting on matters of general or public interest cannot be charged with the intolerable burden of guessing what inferences a jury might draw from an article and ruling out all possible false and defamatory innuendoes that could be drawn from the article.

Id. at 487-88 (citation omitted).

In *Saenz v. Playboy Enterprises, Inc.*, 841 F.2d 1309, 1317-18 (7th Cir. 1988), the Seventh Circuit reaffirmed *Woods* and held that the federal "actual malice" standard, defined through a subjective standard, must be met with "convincing clarity" in cases arising from allegedly defamatory implications. The court reasoned that the requirement of actual intent followed from the federal constitutional rules governing direct defamation claims:

> If a plaintiff official must establish by clear and convincing evidence that the defendants acted with actual knowledge of or in reckless disregard for the falsity of their accusations, it follows that where the plaintiff is claiming defamation by innuendo, he also must show with clear and convincing evidence that the defendants intended or knew of the implications that the plaintiff is attempting to draw from the allegedly defamatory material.

Id. at 1318.

The Ninth Circuit in *Newton* adopted this same approach. In that case, entertainer Wayne Newton had obtained a jury verdict in his favor in a defamation action against NBC. *Newton*, 930 F.2d at 679. The district court then denied NBC's motion for judgment notwithstanding the verdict on the ground that the NBC broadcast had defamed Newton by implying that the Mafia had obtained a hidden interest in the Aladdin Hotel in Las Vegas by helping to finance Newton's acquisition of the hotel. *Id.* The district court held that NBC "should have foreseen" the defamatory implication. On appeal, the Ninth Circuit held that the district court had erred:

> The district court's standard of what "should have been foreseen" is an objective negligence test while the actual malice test of *New York Times* is deliberately subjective. The relevant inquiry asks whether a journalist "realized that his statement was false" or whether he "subjectively entertained serious doubt as to the truth of his statement." *Bose*, 466 U.S. at 511 n. 30, 104 S. Ct. at 1965 n. 30. Negligence, weighed against an objective standard like the one used by the district court, can never give rise to liability in a public figure defamation case. "A 'reckless disregard' for the truth . . . requires more than a departure from reasonably prudent conduct." *Harte-Hanks*, 109 S. Ct. at 2696. Accordingly, the district court erred in basing liability on an objective standard.

Id. at 680.

The Ninth Circuit's decisions here and in *Newton* are fully consistent with and correctly applied this Court's well-settled First Amendment jurisprudence, including *New York Times* and its progeny. Petitioner has presented no basis upon which this

Court should adopt a different set of rules for cases of alleged defamation-by-implication. Accordingly, there is no basis for review by this Court.

II.

THE DECISIONS OF THE COURTS OF APPEALS ARE NOT IN CONFLICT ON THE ISSUE PRESENTED BY THE PETITION.

Contrary to Dodds' assertion, there is no conflict among the courts of appeals on the question presented by the petition. First, as noted above, the test applied in the Seventh Circuit is entirely consistent with the Ninth Circuit's test, for both require the plaintiff to "show with clear and convincing evidence that the defendants intended or knew of the implication that the plaintiff is attempting to draw from the allegedly defamatory material." *Saenz*, 841 F.2d at 1318.

In support of his claim that the Seventh and Ninth Circuits are in conflict, petitioner cites a passage in the Seventh Circuit's opinion in *Woods* where the court suggested in dictum that the result in that case might have been different "if the column could reasonably have only the meaning the plaintiff ascribes to it or if there was evidence that [the defendant] harbored ill-will for the plaintiff." *Id.* at 488 (discussing *Cochran v. Indianapolis Newspapers, Inc.*, 175 Ind. App. 548, 372 N.E. 2d 1211 (1978)). Even if this passing observation by the Seventh Circuit had been a reference to federal constitutional law — which it was not[6] — it does not create any conflict with the

6. *Woods* involved a private figure, not a public figure. The Indiana courts had incorporated the *New York Times* "actual malice" standard into state law, however, in cases involving private figures and issues of public concern. *See Woods*, 791 F.2d at 483. The Seventh Circuit thus decided the "actual malice" issue as a matter of state law.

Ninth Circuit's decision here. The Seventh Circuit's comment simply recognized that, as an evidentiary matter, the fact that a statement can be subject to *only one* meaning may in some circumstances undercut a defendant's assertion that he did not intend that meaning. Nothing in the court's analysis undercut its central holding that a showing of subjective intent is required in cases of defamation-by-implication just as in cases of direct defamation, and that summary judgment is proper where the evidence fails to show such subjective intent with "convincing clarity" (*id.* at 485-86) — a holding that is squarely consistent with the Ninth Circuit's decision here. *See also Saenz*, 841 F.2d at 1318 (Seventh Circuit reaffirming plaintiff's burden in "defamation by innuendo" cases of showing defendant's subjective intent by clear and convincing evidence); *Corporate Training Unlimited, Inc. v. NBC, Inc.*, 981 F. Supp. 112, 121 (E.D.N.Y. 1997) (adopting Seventh Circuit approach and entering summary judgment in innuendo case).

Dodds also posits a conflict between the Ninth Circuit's approach and that employed by the District of Columbia Circuit in *White v. Fraternal Order of Police*, 909 F.2d 512 (D.C. Cir. 1990), and by the Fourth Circuit in *Chapin v. Knight-Ridder*, 993 F.2d 1087, 1093 (4th Cir. 1993). Neither *White* nor *Chapin* conflicts with the Ninth Circuit's decision here. To the contrary, both courts resolved the defamation-by-innuendo claims before them by determining, as a matter of state law, that the defendants' statements were not reasonably capable of bearing the defamatory meanings ascribed to them by the plaintiffs. Thus, both courts resolved the cases on the basis of the first prong of the test utilized by the court of appeals below. Neither court reached the second prong of the test, at issue here, and neither court ever held that an objective showing would satisfy the federal, Constitutional "actual malice" requirement in implied defamation cases brought by public officials.

In *White*, a police officer sued the Washington Post and NBC for allegedly implying that he had used illegal drugs. The court of appeals upheld the entry of summary judgment on the ground that, as a matter of District of Columbia law, the media defendants' publications "were not capable of bearing a defamatory meaning." 909 F.2d at 514, 518-19. This threshold state law determination meant that the court did not need to, and did not, address the question whether as a federal constitutional matter the plaintiff would have needed to show, or could have shown, actual malice as well. *Id.* at 525-27.[7]

In *Chapin*, the Fourth Circuit similarly rejected as a matter of state law the plaintiff's argument that the statements at issue contained a defamatory implication, and the court therefore did not reach the federal constitutional question decided by the Ninth Circuit here. 993 F.2d at 1092-1098. Specifically, the court found that the statements about which the plaintiff complained could not under Virginia law carry with it the defamatory implications ascribed to it by plaintiff, and thus were not actionable. *Id.*

Contrary to petitioner's assertion, in neither *Chapin* nor *White* did the court of appeals decide as a federal constitutional matter that a requirement of subjective intent was "*not* part of

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7. The court did restate the common law principle that it is "immaterial *for purposes of finding defamatory meaning* whether the author or broadcaster *actually* intends or endorses the defamatory inference." *Id.* at 520 (emphasis added). That holding is fully consistent with the Ninth Circuit's approach here, where the court found that the defamatory implication identified by Dodds could reasonably have been drawn from the ABC broadcast, without considering whether ABC intended to convey that message. Pet. App. 22a. But the *White* court nowhere holds, as petitioner suggests, that liability could be imposed upon a media defendant for publishing a report regarding a public official without an *additional* showing of actual malice.

the actual malice test." Pet. 8 (emphasis Petitioner's). To the contrary, the Fourth Circuit in *Chapin* expressly noted that

> [t]he First Amendment requires that public figures prove by clear and convincing evidence that a false publication on a matter of public concern was made with "actual malice," which does not refer to ill will, but rather to *knowledge of falsity or reckless disregard of a "high degree of awareness of . . . probable falsity."*

993 F.2d at 1092, n.5 (quoting *Harte-Hanks,* 491 U.S. at 667). In *White*, the D.C. Circuit did not address *at all* the question what standard should apply for determining intent, having decided that issue solely as a matter of state law. Accordingly, as with the claimed conflict with the Seventh Circuit, discussed above, petitioner's claim of a "conflict" with the Fourth and District of Columbia Circuits is simply erroneous.

III.

PETITIONER WAIVED ANY CLAIM THAT AN OBJECTIVE TEST SHOULD BE USED TO DETERMINE ABC'S LIABILITY BY EXPLICITLY STIPULATING BELOW TO THE APPROACH ADOPTED BY THE DISTRICT COURT.

Dodds' petition should be denied for the additional reason that he waived any claim that an objective test should be used to determine liability in this case. In response to ABC's motion for summary judgment, and consistent with the local rules of the district court, petitioner filed a "Statement of Genuine Issues" with the district court to respond to ABC's statement of undisputed facts and conclusions of law.[8] In his written submission, petitioner

8. *See* Local Rules of the United States District Court, Central District of California, Rule 7.14.2. ABC's statement of undisputed facts and conclusions of law was submitted as provided in the court's Local Rule 7.14.1.

expressly listed as "undisputed" the conclusion that, in order to prevail on his claim in this case, he would have to offer "clear and convincing evidence that ABC *in fact* 'intended that the [broadcast] be read to contain the defamatory innuendoes that plaintiff attributes to it' " (emphasis in original). At no time during the proceedings before the district court did petitioner seek to withdraw this concession, and the district court expressly noted petitioner's concession of the issue in its ruling on the summary judgment motion.

The issue that Dodds has presented to this Court was raised for the first time in his opening brief to the Ninth Circuit. That court chose to reject the argument on its merits, and did not address ABC's contention that the argument had been waived.

This Court has repeatedly stated that, barring "exceptional" circumstances, it will not consider an argument that a party failed to raise in one or more of the lower courts. *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957); *Lawn v. United States*, 355 U.S. 339, 362-63 n.16 (1958). *See also Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985) (noting that a respondent should present in the opposition to a petition for writ of certiorari any claim that the petitioner waived a claim by not raising it at the trial court level).

Here, no such "exceptional" circumstances exist. The question of the burden of proof that should apply on the "actual malice" question was directly presented to petitioner, and he represented to the district court in writing that he did not dispute that it was his burden to prove that ABC intended the implication about which he was complaining. That formulation was expressly adopted by the district court, which referred to petitioner's concession on the point, and then was affirmed by the Ninth Circuit. It is this same issue that petitioner is now

seeking to contest before this Court. Because petitioner expressly waived the issue before the district court, this Court should not entertain it here.

CONCLUSION

For all the foregoing reasons, Dodds' petition should be denied.

Respectfully submitted,

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